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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THURSTON MOTOR LINES, a corporation,

Petitioner

v.

RANDY BRADY, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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32 pp

QUESTION PRESENTED FOR REVIEW

When a plaintiff claims that he was discharged by his employer in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, and at trial the defendant shows, without contradiction, that a clearly dischargeable offense was committed and presents detailed evidence as to why the defendant reasonably and in good faith believed, and still believes, that it was the plaintiff who committed the offense, but the plaintiff denies that he did so, and the District Court credits the plaintiff's denial and thereupon rules that the plaintiff, being a black man, has been discharged in violation of the Statute - is not such ruling clearly in error as to what constitutes violation, and proof of

violation, of this Statute?

LISTING OF ALL PARTIES IN THE CASE

The plaintiffs in the case are as follows: - Randy Brady, James Williams, Michael Fox, Jerry Hunter, Francis Pendergrass, Lacy Monds, Chris Watkins, Curtiss Crawford and Lorenzo Mosely.

The defendant in the case, now Petitioner in this Court, is Thurston Motor Lines, a corporation.

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OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the Western District of North Carolina has not been published in the official reports. The opinion of the United States Court of Appeals for the Fourth Circuit is published at 726 F.2d 136 (4th Cir. 1984). Both opinions are set forth in the separate Appendix which is filed with this Petition, and which is itself indexed.

JURISDICTION OF THIS COURT

The opinion of the Court of Appeals, embodying its decision and judgment, is dated January 18, 1984, and was entered on that date.

Thereafter, within apt time, the Petitioner filed with the Court of

Appeals a Petition for Rehearing and Suggestion for Rehearing en banc, which was denied on March 2, 1984. The filing of this Petition for Certiorari is within ninety days from the date of such denial of rehearing.

Jurisdiction to review the decision of the Court of Appeals by writ of certiorari is conferred on this Court by the provisions of 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the

security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."
42 U.S.C. §1981

"It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color,

religion, sex, or national origin . . ."
42 U.S.C. §2000e-2

STATEMENT OF THE CASE

The Petitioner believes that everything pertinent to a statement of the case is elsewhere set forth in this Petition, in the "Question Presented For Review" and in the "Reasons For The Granting Of A Writ Of Certiorari" - and in the interest of brevity need not be repeated at this point.

REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI

The only aspect of this case involved in this Petition for Certiorari is the defendant's discharge of the plaintiff, James Williams, one of the defendant's black employees. The essential circumstances of Williams' discharge

can be briefly stated.

The evidence is undisputed that the defendant, a trucking company, in the implementing of company and governmental safety regulations at the Company's central terminal in Charlotte, North Carolina, routes all incoming trailer units through a "service lane" inspection, and if a trailer is found to be "hazardous to operate," a red "out-of-service" tag is wired to the handle of the trailer door.[1] If, contrary to company and governmental regulations, such tag is thereafter removed before repairs are made, the signal to maintenance and repair personnel is thereby lost, and such tag removal has the effect of channeling that trailer back

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[1]Appendix pp. 138-141, 144-146.

to the highways in its unrepaired condition.[1] The defendant presented detailed evidence that it discharged Williams, a trailer loader and unloader, for surreptitiously removing a red "out-of-service" tag from the Company's trailer "number 4171," in order to avoid the work of unloading an especially difficult "head-load" on this trailer[2] - thereby placing this trailer "in line" to move out onto the highways with a defective braking system.

The defendant further presented uncontradicted evidence that Williams was the only employee who "worked" this trailer on this occasion, and Williams acknowledged that he was "aware" that the trailer had

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[1] Appendix pp. 140-141.

[2] Appendix pp. 134, 135, 138.

a red "out-of-service" tag attached to it, but he denied that he removed the tag from the trailer.[1] It is further undisputed that the tag was found on the same day "wadded up" in a nearby trash can.[2]

The District Court at one point stated that "Williams testified that he told his supervisor about the tag."[3] In support of that statement, the District Court made no citation to anything in the record, and with all due respect, it is erroneous. There is no such testimony in the record. Williams actually testified to the contrary, namely, that he asked his supervisor to "look at" the load on a

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[1]Appendix p. 141.

[2]Appendix pp. 139, 141.

[3]Appendix p. 88.

truck trailer - and, further Williams testified, "that's all I said to him."[1]

The plaintiffs presented no evidence whatever by way of challenging or questioning the reasonableness and the good faith of the defendant in concluding that Williams had removed the out-of-service tag from the trailer.

The defendant also presented undisputed evidence that it had at various times discharged a total of twenty other employees - seventeen white and three blacks - for actions involving danger or potential danger to life or property, in the operation of its trucking business. There is no evidence that the defendant had ever failed to discharge any employee -

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[1] Joint Appendix in Court of Appeals, p. 2102.

white or black - whom it found to have been involved in actions causing situations of danger.

The majority opinion in the Court of Appeals recognized that "the removal of the tag could have" indeed "endangered lives."[1] The "specially concurring" opinion noted that although Williams testified that "he did not remove" the red tag, such denial was "without any direct or circumstantial corroboration," and that such removal if "accepted" as the act of Williams was indeed a "justifiable" cause and "reason" for "his discharge."[2]

The dissenting opinion in the Court of Appeals characterized the majority opinion

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[1]Appendix p. 20.

[2]Appendix p. 33.

in the Williams case as "clearly erroneous."[1]

> "There simply is no evidence in the record at all that Williams' discharge was motivated either by his race or by his filing discrimination charges with the EEOC . . ."[2]

> "The facts concerning the removal of the out-of-service tag from the trailer involved are without contradiction in the record. Taken most favorably to Thurston, they show that Williams removed the tag. Taken most favorably to Williams, they

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[1]Appendix p. 32.

[2]Appendix p. 31.

> show that Thurston thought, with good reason, that Williams removed the tag. Neither inference which may be drawn from these facts has anything to do with race or filing charges with the EEOC."[1]

The District Court, however, credited Williams' denial of having removed the trailer's red tag, and thereupon held that the discharge of the black employee Williams, for an offense which the Court declared he had not committed, constituted a violation by the defendant of Title VII of the Civil Rights Act of 1964,

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[1] Appendix p. 32.

42 U.S.C. §2000e-2.[2]

It is respectfully submitted that this represents an inadvertent, but fundamental, misconception of the meaning of 42 U.S.C. §2000e-2 and of the proof which must be made in order to establish violation of that Statute.

The District Court's finding that Williams did not remove the red tag does not by any means resolve, or even reach, the issue of whether the defendant discharged Williams "because of" his being a black person.

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[1]As hereinabove mentioned, the District Court also made references to Williams' having filed, with the EEOC, a charge against the defendant some two years prior to his discharge and, said the District Court, Williams' discharge was in retaliation for the filing of that charge. Yet the record may be searched from beginning to end and no testimony or evidence whatever will be found in support of that pronouncement by the District Court.

Although it was incumbent upon the plaintiffs to present proof, either direct or circumstantial, that the defendant discharged Williams because he is a black person, the plaintiffs brought forward no such evidence whatever. On the other hand, the defendant, as has been hereinabove pointed out, did present evidence refuting any suggestion or assumption that Williams was discharged because of his being black.

It is perhaps understandable that even courts now and then continue to fall into basic error on this subject. For it is undoubtedly true that the Civil Rights Act of 1964, and specifically Title VII thereof, was brought about by general and wide spread feeling that national legislation affording special protection to "minorities" was needful. Yet that

is not what became enacted. Protection was indeed afforded to minorities, but only in the sense of assuring, not special protection, but strict neutrality as between persons of different race, color, religion, sex or national origin.

Specifically, this Statute protects a white person, for example, as truly and exactly in the same sense and same degree, as it protects a black person. It directs an employer not to discriminate against any person whomsoever "because of" that person's race.[1]. But the Statute does not purport to protect

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[1]"Race, color, religion, sex, or national origin" are, of course, the correlative terms of the Statute. Since the word "race" is the word pertinent to this case, references herein will be confined to that term.

any person from unfairness or injustice, or even discrimination, at the hands of an employer - except as to discrimination which is proved to have been imposed by the employer upon a person "because of" that person's race.

As to the nature and force of the evidence which must be produced in order to establish that an employer has discriminated against a person "because of" that person's race, it is essential to recognize that such evidence, whether direct or circumstantial, must be sufficient to prove the existence of the central element mandated by the Statute in its key words - "because of." 42 U.S.C. §2000e-2. These words obviously require an ascertainment that the race of the person in question was consciously

considered by the employer in the making of adverse decision or the taking of adverse action against such person, and was an effective part in the making of such decision or the taking of such action, without which the adverse decision would not have been made or the adverse action would not have been taken.

In short, there must be evidence establishing that consideration of a person's race was the conscious motivation and purpose producing the employer's adverse decision or action against such person. Otherwise it cannot logically or sensibly be said that it was "<u>because of</u>" such person's race that the employer made the adverse decision or took the adverse action. We come then to the pivotal point of the case. What evidence has been

produced that Williams' race was considered by the defendant in deciding to discharge, or in discharging, Williams, and what evidence has been produced that Williams' race was an effective part in such decision or action? Neither the District Court nor the Court of Appeals have pointed to any such evidence whatever.

The subject of this contest is an accusation against the defendant that it violated the Statute, 42 U.S.C. §2000e-2, in discharging Williams. The defendant says that it discharged Williams because it reasonably and in good faith believed that he removed the red tag from the trailer. Williams denies that he removed the red tag, and the District Court credited his denial. But whether Williams did or did not remove the red tag <u>is not</u>

the ultimate and controlling question in the case.

The defendant's state of mind and motivation in deciding to discharge and in discharging Williams is the ultimate and controlling question in the case. On that question the defendant produced evidence as to why it reasonably and in good faith believed that Williams removed the red tage - and that this genuine and reasonable belief on its part was its sole motivation in the discharge of Williams. The plaintiffs had the burden of producing evidence to rebut and refute, if they could, the defendant's explanation of the matter. The plaintiffs came forward with no such evidence at all. Yet Williams was awarded judgment. It is submitted that in law and reason, and under the reiterated decisions of this Court and

of other courts as well, such judgment cannot stand.

The United States Courts of Appeal in the First and Eleventh Circuits, for example, have rendered decisions directly inconsistent with such a result.

> "It is well settled in employment discrimination cases such as this that for an employer to prevail, the jury need not determine that the employer was correct in its assessment of the employee's performance; it need only determine that the defendant in good faith <u>believed</u> plaintiff's performance to be unsatisfactory and that the asserted reason for the discharge is therefore not a mere pretext

for discrimination." (emphasis in original).

. . .

"It is not improper for a defendant to introduce evidence reflecting the unsatisfactory performance of a former employee . . . for that evidence is relevant to the real issue - the defendant's motive for termination." (emphasis supplied).

Moore v. Sears, Roebuck & Company, 683 F.2d 1321, 1323 (11th Cir. 1982)

"The reasonableness of the employer's reasons may of course be probative of whether they are pretext. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a

pretext, if indeed it is one. The jury must understand that its focus is to be on the employer's motivation, however, and not on its business judgment."

. . .

". . . [T]he ultimate question is not whether defendant's decision to fire or discipline plaintiff reflected an objective factfinder's judgment . . . but whether it was unlawfully motivated."

. . .

"McDonnell Douglas . . . is not intended to deflect the fact-finder from the central issue of whether the employer was motivated by discriminatory factors."

Loeb v. Textron, Inc., 600 F.2d 1003, 1012, ft. nt. 6, 1014, 1015 (1st Cir. 1979)

This Court in a series of cases

has likewise been at pains to define what must be proved, and by whom, in any effort to establish violation of 42 U.S.C. §2000e-2. These cases, beginning with McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973) and including Teamsters v. United States, 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977), Furnco Construction Corp. v. Waters, 438 U.S. 567, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978), Board of Trustees v. Sweeney, 439 U.S. 24, 58 L.Ed.2d 216, 99 S.Ct. 295 (1978), and Texas Department v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981), have laid down a structure of proof requirement which has been in no way fulfilled in the case of James Williams.

The following groups of quotations from Texas Department v. Burdine would seem to demonstrate clearly the three-step sequence of proof set forth in that decision.

> "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

> "First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination."

> "Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to

the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' "

"It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection."

"When the plaintiff has proved a prima facie case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions."

"Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."

"The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of

intentional discrimination."
Texas Department v. Burdine, 450 U.S. 248, 252, 253, 254, 255, 260, 67 L.Ed.2d 207, 215, 216, 217, 219, 101 S.Ct. 1089 (1981)

It could be deemed that a prima facie case for Williams was put forward when he denied, and was credited in his denial, that he removed the red tag from the trailer. But after that he presented nothing at all and left the defendant's explanation, of its good faith reasons for discharging him, unchallenged. At that point the case for James Williams, under 42 U.S.C. §2000e-2, completely failed.

The defendant respectfully submits that it is entitled to the protection of the carefully developed

rulings of this Court in this important field of law. Wherefore the defendant prays that the Court grant this Petition for Certiorari.

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